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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 14

MAE WHEELER, et al.,
Appellants,

vs.

JOHN MONTGOMERY, Director of the STATE DEPARTMENT OF SOCIAL WELFARE, and RONALD BORN, General Manager of the SAN FRANCISCO CITY AND COUNTY DEPARTMENT OF SOCIAL SERVICES,
Appellees.

On Appeal from the United States District Court for the Northern District of California

Jurisdictional Statement

PETER E. SITKIN,
STEVEN J. ANTLER,
SIDNEY M. WOLINSKY,
CHARLES STEPHEN RALSTON,
1095 Market Street,
San Francisco, California 94103,
Telephone: (415) 626-3811.
Attorneys for Appellants

EDWARD V. SPARER,
LEE A. ALBERT,
MICHAEL S. ZOLA,
Of Counsel.

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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Appellees.

On Appeal from the United States District Court for the Northern District of California

Jurisdictional Statement

Appellants appeal from the judgement of the specially constituted United States District Court for the Northern District of California entered on April 19, 1968, dismissing appellants' action for declaratory and injunctive relief. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the District Court for the Northern District of California dismissing appellants' action is not reported. Copies of the opinion and order dismissing the action are attached hereto as Appendix A. Copies of the opinion and order permitting a class action and certifying the necessity for the convening of a three-judge court are attached hereto as Appendix B. A copy of the temporary restraining order issued by the Court below is attached hereto as Appendix C.

JURISDICTION

This suit was brought on behalf of appellant Mae Wheeler and all others similarly situated for injunctive and declaratory relief under the authority of 42 U.S.C. § 1983, 28 U.S.C. §§ 1343(3) and (4), and 2201 and 2202.

A three-judge court was convened pursuant to 28 U.S.C. §§ 2281 and 2284. The suit was brought for injunctive and declaratory relief against a welfare practice authorized by California statutes which permit the termination of welfare grants without adequate notice and without a hearing, on the ground that said practice violates the Fourteenth Amendment to the United States Constitution. The judgement of the District Court was entered on April 19, 1968, and notice of appeal was filed on June 14, 1968. On July 24, 1968, an application for an extension of time to docket the appeal and file the record was made to Justice William O. Douglas of this Court pursuant to Supreme Court Rule 13 and said application was granted on July 29, 1968. The order provided that the time for docketing the appeal be extended until October 12, 1968.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgement on

direct appeal to this court: *United States v. Georgia Public Social Services Commission*, 371 U.S. 285, 287 (1963); *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73, 75-76 (1960).

STATUTES INVOLVED

California Welfare and Institutions Code, Sections 12200, 12201 and 10950 through 10965, are set forth in Appendix D.

QUESTIONS PRESENTED

1. Does due process permit the termination of a regularly recurring subsistence grant to welfare recipients without adequate notice and without a hearing on the factual questions underlying the decision to cut off assistance?

2. Does an interview with a caseworker or other county welfare official without notice of the evidence relied on for termination and without confrontation or cross-examination satisfy the requirements of the Due Process Clause for a hearing?

STATEMENT

Appellant Mae Wheeler, a 75 year-old unemployed widow, lives alone in an apartment leased to her by the San Francisco Housing Authority. She survives solely on her welfare check of $113.95 per month and her Social Security check of $44.60 per month (D-39, p. 5). Prior to September 1, 1967, Mrs. Wheeler received her welfare check (termed "Old Age Security") every month for almost nine years from the San Francisco County Department of Social Services (hereinafter "County Department") pursuant to the regulations of the California State Department of Social Welfare (hereinafter "California Department"). Mrs. Wheeler did not receive her September 1967 welfare check. Instead, she received a letter from the County De-

partment stating that her welfare grant had been discontinued and setting forth reasons for such action in conformity with the California Department's regulations then in effect which are set forth in Appendix E. Mrs. Wheeler received no welfare aid whatsoever during the months of September, October and November 1967.

Mrs. Wheeler did not secure a hearing before an impartial state referee on the validity of the County Department's discontinuance until December 22, 1967. The impartial referee found the discontinuance to be improper and proposed to the Director of the California Department (Appellee John Montgomery) full restoration of Mrs. Wheeler's welfare assistance. Not until January 12, 1968, over four months after the discontinuance of Mrs. Wheeler's Old Age Security, did the Director adopt the referee's proposed decision and order full restoration of Mrs. Wheeler's welfare assistance. (D-39, p. 6)

During late September and October 1967, Mrs. Wheeler actively but futilely sought restoration of her welfare payments. She talked with her caseworker. She met with a County Department supervisor. She submitted sworn affidavits to the County Department. In November 1967, the County Department confirmed its decision to discontinue Mrs. Wheeler's aid. (D-39, p. 6) Mrs. Wheeler requested a hearing from the California Department and further requested restoration of her welfare payments until a hearing could be held, asserting her lack of food, medicines and other necessities, including inadequate funds for payment of rent. Her request for temporary restoration of payments until a hearing could be held was denied by the California Department.

On December 6, 1967, Judge Alfonso J. Zirpoli of the Court below entered a finding that irreparable injury was

being done to Mrs. Wheeler and issued a temporary restraining order directing the California and County Departments to restore immediately her welfare assistance until a decision was rendered following the hearing to be held by a State referee. (App. C, p. 12a) For three months Mrs. Wheeler subsisted solely on her $44.60 monthly Social Security. But for Judge Zirpoli's intervention that period would have been four and one-half months.

Subsequently, Judge Zirpoli entered a class action order pursuant to Fed. R. Civ. P. 23(b)(2), the class being composed of all Old Age Security recipients in California, and ruled that a determination by a three-judge court was required.[1] He held Mrs. Wheeler to be an adequate representative of the class and on that ground denied a number of motions to intervene in the proceedings. (App. B, p. 5a)

After the three-judge court convened, the California Department[2] adopted a new regulation providing for

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1. Fed. R. Civ. P. 23(c)(1) requires the entry of a class action order at the earliest practical moment in the proceedings. The latest statistics available indicate that there are approximately 285,000 Old Age Security recipients in California. (California Department, *Public Welfare in California—Annual Statistical Report*, Table 3 (1966-1967); Pl. Ex. 4)

2. The Old Age Security program is administered by the county welfare departments in accordance with the rules of the California Department under the direction of Appellee John Montgomery. The rules and regulations of the California Department are established pursuant to the California Welfare and Institutions Code, and in conformity with the requirements of the Social Security Act and with the rules and regulations promulgated by the United States Department of Health, Education, and Welfare (HEW). 49 Stat. 620 (1935), as amended, 42 U.S.C. § 302; see also HEW, Handbook of Public Assistance Administration. The Old Age Security program is one of the three major categorical public assistance programs established by the Social Security Act of 1935, the other two being Aid to Families with Dependent Children and Aid to the Totally Disabled. The programs are financed largely by the Federal Government on a matching fund basis and are administered by the states. *King v. Smith*, 392 U.S. 309, 313, 316 (1968).

an informal conference prior to termination of welfare assistance. A copy of the regulation is set forth in Appendix F, p. 24a.

Holding that California had cured its constitutional deficiency with the new regulation, the Court below dismissed the action on April 19, 1968. (App. A, p. 1a) Appellants contend that the new regulation provides no material change in the procedures which Mrs. Wheeler actually experienced and that those procedures fail to meet the minimum standards of due process of law.[3]

THE QUESTIONS ARE SUBSTANTIAL

I. Introduction.

The fundamental question in this case is whether individuals like Mrs. Wheeler, dependent on public assistance for their basic necessities, may have their recurring subsistence payments arbitrarily denied by local welfare departments without an opportunity to be heard in a full and fair hearing prior to the termination of their welfare payments. This case is but one of an increasing number of suits challenging similar welfare procedures pending in courts throughout the country.[4]

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3. Although the new regulation was not in effect at the time of Mrs. Wheeler's termination, it was always open to a welfare recipient to complain and confer with the local county department; Mrs. Wheeler did indeed complain and confer, but to no avail. (D. 35, pp. 8-17)

4. *McCullough, et al. v. Terzian, et al.*, No. 379011 (Calif. Super. Ct., Alameda Cty., May 2, 1968); *Kelly, et al. v. Wyman, et al.*, Civ. No. 394/68 (S.D.N.Y., May 17, 1968); *Sheafe, et al. v. Wyman, et al.*, Civ. No. 864/68 (S.D.N.Y., May 17, 1968); *Williams, et al. v. Gandy, et al.*, Civ. No. GC 6728 (N.D. Miss., filed June 9, 1967); *Lage, et al. v. Downing, et al.*, Civ. No. 7-2089-C-2 (S.D.Ia., filed Oct. 30, 1967); *Machado, et al. v. Hackney*, Civ. No. 68-108-SA (W.D. Tex., filed April 22, 1968); *Sprayberry, et al. v. Dulaney, et al.*, Civ. No. 11662 (N.D. Ga., filed March 19, 1968); *Jackson, et al. v. Dept. of Public Welfare of the State of Florida, et al.*, Civ. No. 68-568-Civ. E.C. (S.D. Fla., filed May 20, 1968); *Van*

The question here is substantially the same as in *Thorpe v. Housing Authority of the City of Durham*[5] now pending before this Court and scheduled for argument this term. Deeming the issue significant, this Court granted *certiorari* in *Thorpe* on two separate occasions.[6]

A specific demand for prior hearings before termination of public assistance was made by the recent Poor People's Campaign to Wilbur Cohen, Secretary of HEW. Secretary Cohen agreed that this issue was a matter of great concern and stated in his reply that prior hearings would be required.[7] To date, HEW has issued no regulations on this matter.

A lower California state court has rendered an opinion in conflict with the decision below.[8] In another jurisdiction Judge van Pelt Bryan (U.S.D.C., S.D.N.Y.) determined that the two New York prior hearing cases which raise the same issues as herein presented, involve substantial constitutional questions and require the convention of a three-judge court. *Kelly v. Wyman, supra,* and *Sheafe v. Wyman, supra,* n. 4. (Judge Bryan's opinion is set out in full at Appendix I, p. 34a.) The *Kelly, Sheafe* three-judge

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Blaricum v. Dept. of Public Welfare of the State of Ohio, et al., No. 68-78 (S.D. Ohio, March 8, 1968); *Moore, et al. v. Houston*, No. 104435 (Cir. Ct. Wayne Cty. Mich., filed Feb. 23, 1968); and *Diaz, et al. v. Dunn, et al.*, No. 68411F (D. Mass., filed May 15, 1968).

5. *Cert. granted* 390 U.S. 942 (1968) (No. 1003, 1967 Term, renumbered No. 20, 1968 Term).

6. *Cert. granted* 385 U.S. 967 (1966), *remanded*, 386 U.S. 670 (1966), *cert. granted* 390 U.S. 942 (1968).

7. Letter of June 18, 1968, from Wilbur J. Cohen, to the Reverend Ralph Abernathy, Chairman of the Poor People's Campaign and President of The Southern Christian Leadership Conference.

8. *McCullough v. Terzian*, No. 379011 (Calif. Super. Ct., Alameda Cty., May 2, 1968) set out in Appendices G and H, pp. 26a-33a).

court requested the views of the United States Attorney General on the merits.[9]

In addition to the conflict in decisions already present, the possibility of further conflict and confusion arising out of the similar cases pending in nine other jurisdictions hastens the need for Supreme Court guidance. For too long welfare agency action has been free to operate arbitrarily and outside the purview of judicial scrutiny.

II. Prior decisions of this Court require hearings to be timely and adequate.

Due process of law protects every individual from arbitrary state action. *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio,* 301 U.S. 292 (1937). "The play and action of purely personal and arbitrary power" is not to be tolerated. *Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1886). This Court has consistently upheld the principle that an individual's essential interests may be acted upon by government only after an opportunity to be heard has been afforded the individual. In *Londoner v. Denver,* 210 U.S. 373, 385 (1908), which involved the assessment of a municipal street improvement tax, the taxpayer had the right to be heard "before the tax became irrevocably fixed." In *Opp Cotton Mills v. Administrator,* 312 U.S. 126 (1941), this Court, in upholding the application of the minimum wage standards of the Fair Labor Standards Act to a textile manufacturer, stated that due process does not:

> "... require a hearing at the initial stage or at any particular point ... in an administrative proceeding so

9. In the other pending cases, *supra,* n. 4, three-judge courts have been convened in Mississippi, Ohio, Texas, Georgia, and Iowa. A lower Michigan state court recently held that failure to provide hearings prior to termination of welfare assistance violated due process of law. *Moore v. Houston, supra,* n. 4 (decided August 30, 1968).

long as the requisite hearing is held before the final order becomes effective." 312 U.S. at 152-53.

Accord, United States v. Illinois Central R. Co., 291 U.S. 457, 463 (1934); *Morgan v. United States*, 304 U.S. 1, 18-19 (1937).

Recently this Court has held that due process requires the government to grant opportunity for a hearing before it terminates a man's employment, *Slochower v. Board of Education*, 350 U.S. 551 (1956); *Cole v. Young*, 351 U.S. 536 (1956); *c.f. Greene v. McElroy*, 360 U.S. 474 (1959); before it may expel a resident alien, *Kwong Hai Chew v. Colding*, 344 U.S. 590, 597-598 (1953); before it may deny a man a license, or certificate of admission, to practice his profession, *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963); *Goldsmith v. Board of Tax Appeals*, 270 U.S. 117, 123 (1926). In addition, a number of recent Court of Appeal decisions have required a hearing: before an individual is disbarred from receiving government contracts, *Gonzales v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964); before retirement pay can be deprived, *Garrott v. United States*, 340 F.2d 615 (Court of Claims, 1965); before a student may be expelled from a state university, *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961), *cert denied*, 368 U.S. 930 (1961); before a municipal hospital terminates a doctor's employment, *Birnbaum v. Trussel*, 371 F.2d 672 (2d Cir. 1966); before a liquor license may be denied, *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964), *rehearing denied*, 330 F.2d 55 (5th Cir. 1964); see also *Quevedo v. Collins*, Civ. Action No. CA 3-2626-C (N.D. Tex., July 12, 1968) (eviction from public housing).

The rationale of the foregoing holdings is that procedural protections are necessary to minimize discretion-

ary abuse, to correct errors before harm is worked, and to avoid arbitrary erosion of individual rights. Welfare is no exception to this rationale; to the contrary, the dangers of error, abuse and invasion are greater due to the dependent relationship between the individual recipient and the understaffed and overworked governmental welfare departments.

Indeed, the questions regarding eligibility and termination involve a host of individual factual determinations;[10] determinations which customarily require a trial-type hearing.[11]

In *Green v. McElroy*, 360 U.S. 474 (1959), this Court stressed the effect on the individual's livelihood of the challenged admistrative action. *Cf. Garrott v. United States, supra,* at 340 F.2d 619. Clearly, termination of Mrs. Wheeler's subsistence grant falls into that category for which due process requires a hearing before action is taken. The mere prospect of retroactive payments cannot fill an empty stomach, pay the monthly rent, or deal with the anxiety of being destitute.

III. California procedures do not afford timely hearings.

The California Department's revised regulation (set forth in Appendix F, p. 24a) provides only for an informal

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10. Factual determinations involving welfare eligibility include intent to transfer property (Mrs. Wheeler), presence of man in the house (Mrs. McCullough), availability of income, possession of excess personal property. Judge Bryan stated in *Kelly* and *Sheafe, supra,* n. 4:

> "It should also be pointed out that the type of questions presented by the termination alleged in the complaint appear to be questions of fact going to the eligibility of the recipients for aid under present standards." (App. I, p. 40a)

11. See *Willner v. Committee on Character and Fitness,* 373 U.S. 96 (1963); *Goldsmith v. Board of Tax Appeals,* 270 U.S. 117 (1926), 1 Davis, *Administrative Law,* §§ 7.01-7.05 (1958 and Supp. 1965).

conference with caseworker personnel of the county departments prior to termination of welfare assistance. The regulation calling for such a conference had not been promulgated at the time of Mrs. Wheeler's termination. However, she did confer informally, more than once, with a County Department supervisor in the manner contemplated by the regulation after termination of her welfare assistance. The conference resulted only in confirmation of the termination by the County Department indicating the inadequacy of the informal conference as a protection for the welfare recipient.

In *McCullough v. Terzian, supra*, n. 4 (the California state court case involving the same California procedures), Mrs. McCullough was afforded an informal conference with a local county department caseworker. She was offered the alternatives of either immediate termination of her welfare assistance or continued aid at a reduced level *provided* she admit to be cohabitating with a man. Mrs. McCullough refused to make such an admission and was ultimately vindicated three and one-half months after her grant had been terminated by an impartial state referee at a full and fair hearing.

IV. The requirements of due process in welfare hearings.

Without reasoned analysis and without supporting authority, the lower court relied upon the newly promulgated regulation to dismiss this action. (App. A, p. 1a) The regulation fails to afford the protection of due process of law; it fails to provide for an impartial referee; it fails to provide for sufficient notice of the informal conference; it fails to provide the welfare recipient adequate time to conduct discovery and otherwise prepare for the conference; it fails to place the burden of proof on the County Department (on the contrary, the burden is upon the wel-

fare recipient to prove she is still entitled to public assistance); it fails to require that a reporter be present at the conference, or that a record of any sort be made, or that the decision resulting from the conference be made upon written findings and conclusions, or even that the decision be based upon the evidence adduced at the conference; and it fails to provide the welfare recipient with the right to confront the evidence against her and to cross-examine witnesses for the County Department. In short, the informal conference procedure does not approach due process of law.[12]

Strict impartiality is required in the welfare context. Recipients are generally submissive and "must depend to a remarkably high degree upon the continued favor of their social workers who are presently vested with wide discretion to authorize or prohibit expenditures." *Parrish v. Civil Service Commission*, 57 Cal. Rptr. 623, 628, 425 P.2d 223, 228 (1967).[13] The California regulation provides an informal conference with the caseworker or another responsible person in the county department. (App. F. p. 25a) In practice, the conference is between the recipient and the same case-

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12. *See Note: Withdrawal of Public Welfare : The Right to a Prior Hearing*, 76 Yale L. J. 1234, 1239 (1967). The authors of a recent law journal article concluded after extensive research that a public assistance hearing must contain, at a minimum, the following elements: notice, discovery, right to counsel, oral hearing, confrontation, cross-examination, impartial tribunal, decision on the record and judicial review. Burrus, *Constitutional Due Process Hearing Requirements in the Administration of Public Assistance*, 16 Am. U. L. Rev. 199, 218 (1967); see also Morris, *Welfare Benefits as Property : Requiring a Prior Hearing*, 20 Admin. L. R. 487 (1968).

13. See also Briar, *Welfare From Below : Recipients' Views of the Welfare System*, 54 Calif. L. Rev. 370 (1966); *Operations Partially Subject to the A.P.A. : Public Welfare Administration*, 44 Calif. L. Rev. 242, 255, 259 (1956). For authority describing the "brittle" and "adversary" relationship between caseworker and recipient, see *Report of the National Advisory Commission on Civil Disorders*, Bantam Books (1968), at pages 457-467.

worker who made the initial decision to terminate welfare payments. On occasion the caseworker's direct supervisor, who has previously confirmed the decision to terminate, participates in the conference procedure.

> ". . . It is too clear to require argument or citation that a fair hearing presupposes an impartial trier of fact and that prior official involvement in a case renders impartiality most difficult to maintain."[14]

This principle of separation of function finds clear expression in the HEW fair hearing regulations which require the states to have their hearings conducted by an "impartial official (or officials) of the state agency." HEW, Handbook of Public Assistance Administration, Pt. IV, § 6300(h).[15]

Equally deprecating to our notion of due process is the inadequate notice provisions in the California regulation. A fundamental requirement of due process is "the opportunity to be heard, at a meaningful time in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Neither the form of notice provided the recipients under the regulation nor the amount of time provided for preparation for the informal conference allows for a meaningful hearing.

The regulation states that recipients are to be informed of the reasons for the termination of welfare payments. "Discontinued due to increased personal property", "Failure to cooperate" or "Failure to provide essential information" are typical reasons given. The regulation provides that the recipient is to be notified of the termination at least three days prior to the withholding of the grant and that the notice shall inform the recipient that an informal con-

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14. *Wasson v. Trowbridge*, 382 F.2d 807, 813 (2d Cir. 1967); see also *Pan American World Airways, Inc. v. Boyd*, 207 F. Supp. 152, 154-155 (D.C. D.C. 1962).

15. See also Administrative Procedure Act, 5 U.S.C. § 554 (1967).

ference may be held at least one day prior to termination, at which time the recipient is to submit all information and affidavits necessary to re-establish eligibility for welfare. California gives the recipient two days to prepare to argue for her livelihood.

Making a record at the lowest level of proceedings is essential to due process of law. *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292 (1937); *U.S. v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 294 U.S. 499 (1935); *Kwock Jan Fat v. White*, 253 U.S. 454 (1920); *Bell Lines, Inc. v. U.S.*, 263 F. Supp. 40 (S.D. W. Va. 1967); and *Travel Service, Inc. v. U.S.*, 263 F. Supp. 302 (D.C., R. I. 1966).

The regulation specifically requires the recipient to carry the burden of re-establishing eligibility for welfare assistance. Once a person has been found eligible for assistance that individual has a statutory right to receive such assistance promptly and without interruption.[16] Such a right is meaningless if it can be destroyed by an *ex parte* decision of the County Department caseworker, thereby once again placing the burden on the recipient to establish eligibility.

The right of confrontation and cross-examination is essential to due process of law in cases involving deprivation of livelihood. *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1962); *Greene v. McElroy*, 360 U.S. 474 (1959); *Reilly v. Pinkus*, 338 U.S. 269 (1949); *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964); *Southern Stevedoring Co. v. Voris*, 190 F.2d 275 (5th Cir. 1951); *Rios v. Hackney*,

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16. The Social Security Act of 1935, as amended, 42 U.S.C. § 302(a) (8); HEW, Handbook of Public Assistance Administration, Pt. IV, § 2200 (1967); *Smith v. King*, 277 F. Supp. 31, 38 (N.D. Ala. 1967), *aff'd*, 392 U.S. 309 (1968); see also *Board of Social Welfare v. County of Los Angeles*, 27 Cal. 2d 81, 162 P.2d 630 (1945); *Sacramento Orphanage and Children's Home v. Chambers*, 25 Cal. App. 536, 144 P. 317 (1914); *County of Alameda v. Jackson*, 16 Cal. 2d 276, 281 (1940).

C.A. 3-1852 (N.D. Tex., Nov. 30, 1967). See also *Gonzales v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964); *Bland v. Connally*, 293 F.2d 852 (D.C. Cir. 1961); *N.L.R.B. v. Prettyman*, 117 F.2d 786 (6th Cir. 1941). This right is absent from the California regulation and from the informal conference.

Thus, an adequate hearing comporting with the fundamental requirements of due process of law is not afforded California welfare recipients prior to termination of their public assistance.

V. HEW regulations require a fair hearing.

The special disabilities of welfare recipients and their dependence on the system for their subsistence has led to the development by HEW of procedural rights in the fair hearing.[17]

Under HEW regulations every state welfare plan must contain certain provisions for a fair hearing: review of local determination by an impartial official of the state welfare department; complete and effective notice; the decision to be based solely on the evidence adduced at the hearing; adequate time for discovery and inspection; opportunity to question or refute testimony or evidence and a prompt decision.[18] There is nothing in the HEW regulations which requires the fair hearing to be held after termination of assistance. Indeed, the regulations expressly permit the continuation of payments pending a hearing decision.[19] The

17. See Scholz, Bernard W., *Hearings in Public Assistance*, Social Security Bulletin, July 1948, at p. 3.

18. HEW, Handbook of Public Assistance Administration, Pt. IV, §§ 6200, *et seq.* (set out in full in App. J., pp. 43a-53a).

19. HEW, Handbook of Public Assistance Administration, Pt. IV, § 6500(b). HEW has specifically stated that federal financial participation is available to California if aid payments continue until a fair hearing decision is rendered. Letter, dated February 9, 1968, from St. John Barrett, Deputy General Counsel, HEW, to Peter E. Sitkin. (Pl. Ex. 1)

informal conference available to California recipients prior to termination does not comport with either the HEW fair hearing regulations or the constitutional mandate of due process of law.

VI. The informal conference prior to termination and the HEW fair hearing after termination do not combine to meet due process of law.

The lower court opinion was based upon a feeling that a combination of the informal conference prior to termination and the fair hearing after termination would jointly create due process of law. Appellants do not seek a certificate of inadequate process, but only one remedy—an effective and timely fair hearing before termination. The informal conference with the County Department caseworker does not provide such a remedy. Hearings provided months after termination cannot undo the harm done by the erroneous denial of a subsistence grant.[20]

VII. Summary of argument.

The requirements of due process in the welfare context must not be any less strict than in other areas of adminis-

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20. HEW requires hearing decisions within 60 days from the date of request. Handbook of Public Assistance Administration, Pt. IV, § 6200 (j). Two months without public assistance has disastrous consequences and results in extreme hardship, witness Mrs. Wheeler's experience. The average time elapsing between a fair hearing request and decision has been six months (D-39, p. 7). At present, California is not meeting the Federal time limits nor is there any evidence that California plans to do so. Appellants' attorneys are personally aware of over 50 cases that have been pending for more than three months. As recently as August 23, 1968, appellants' attorneys were forced to seek judicial redress in order to obtain a fair hearing decision. The decision was finally rendered on September 20, 1968, over six months after the date of request. *James v. Montgomery*, Civil Action No. 592705, Calif. Super. Ct., San Francisco Cty. (September 24, 1968). The two recipients in the *McCullough v. Terzian* case, supra, n. 4, received their fair hearing decisions over three months after their appeals were filed.

trative law. The unique relationship of the recipient and her dependency on the welfare agency, the recipient's lack of resources and skills to effectively articulate her position, the factual nature of the issues presented, and the extent of the injury which a recipient will suffer, must all be considered when determining the extent to which procedural safeguards are required to insure that her interest is fairly and properly protected.

Although the recipient's livelihood is at stake, no meaningful opportunity to demonstrate the error in the County Department's termination is provided until well after the termination has had a direct and fearful impact. Such a procedure allows and encourages arbitrary action. It places recipients at an unfair disadvantage as compared with the County Department caseworker. The dignity of the recipient is lost when it is fear that motivates her relations with her caseworker. Moreover, those recipients who do manage to scrape by when wrongfully terminated are forced to undergo further humiliation and degradation—contrary to the purposes of these categorical aid programs. They are compelled to beg from relatives (who may be poor themselves), charitable institutions, and local businessmen who may extend credit (usually at a stiff price). If the aim of these assistance programs is to protect the dignity of the individual and to foster his independence, due process of law cannot permit summary action by welfare authorities without a prior full hearing.

Addressing the issue, Professor Charles A. Reich has written, concerning public welfare programs generally:

> "In a society where a significant portion of the population is dependent on social welfare, decisions about eligibility for benefits are among the most important that a government can make. By one set of values the granting of a license to broadcast over a

television channel, or to build a hydroelectric project on a river, might seem of more far-reaching significance. But in a society that considers the individual as its basic unit, a decision affecting the life of a person or a family should not be taken by means that would be unfair for a television station or power company. Indeed, full adjudicatory procedures are far more appropriate in welfare cases than in most of the areas of administrative procedure."[21]

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21. Reich, *Individual Rights and Social Welfare : The Emerging Legal Issues*, 74 Yale L. J. 1245, 1253 (1964-1965).

CONCLUSION

It is respectfully prayed that the Court should review the judgment of the District Court and enter a judgment reversing the decision below.

Respectfully submitted,

PETER E. SITKIN,
STEVEN J. ANTLER,
SIDNEY M. WOLINSKY,
CHARLES STEPHEN RALSTON,
1095 Market Street
San Francisco, California 94103.
Attorneys for Appellants

EDWARD V. SPARER,
LEE A. ALBERT,
MICHAEL S. ZOLA,
Of Counsel.

Appendix A

OPINION OF THE COURT BELOW DISMISSING ACTION

United States District Court
for the Northern District of California

No. 48303

Mae Wheeler, individually and on behalf of all others similarly situated,
Plaintiffs,

vs.

John Montgomery, et al.,
Defendants.

MEMORANDUM OPINION AND ORDER DISMISSING ACTION

This is an action for declaratory and injunctive relief. The facts concerning the named plaintiff—Mae Wheeler—are essentially as follows: The county welfare agency received a phone call which informed the county that Mrs. Wheeler had received the proceeds of her deceased son's insurance policy and had transferred the money to her grandson. The county determined that Mrs. Wheeler was therefore ineligible for continued welfare (Old Age Security [O.A.S.]) assistance and terminated her aid without affording her a hearing on the alleged facts prior to termination. On December 20, 1967, Judge Alfonso J. Zirpoli, the single judge to whom the application for a temporary restraining order was originally addressed, signed his memorandum opinion and entered various orders. He found the action to necessitate the convening of a three judge court and found a class action appropriate.

The parties have submitted extensive briefs and exhibits and the matter was submitted to the three judges on April 12, 1968, following oral argument.

With respect to the named plaintiff—Mae Wheeler—she has now been afforded a "fair hearing" and has been found eligible for continued O.A.S. assistance. Furthermore, the claim originally pressed by plaintiff—that at least *some* hearing *prior* to the termination of O.A.S. was constitutionally compelled—has now been conceded by defendants. The State of California, subsequent to Judge Zirpoli's order of December 20, has adopted new regulations which do provide for what plaintiff terms an "informal conference" with the recipient (whose aid the county is about to terminate) and the county agency which is about to make the determination that the recipient is no longer eligible for aid.[1]

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1. Reg. 44-325.43 (effective April 1, 1968), as set forth in CALIFORNIA STATE DEPARTMENT OF SOCIAL WELFARE MANUAL, provides as follows:

44-325.43 *Notification* . . .

The recipient, the parent or other person responsible for the child in *AFDC*, shall be notified, in writing, immediately upon the initial decision being made to withhold a warrant beyond its usual delivery date for any reason other than death, and in no case less than three (3) mail delivery days prior to the usual delivery date of the warrant to the recipient. The county shall give such notice as it has reason to believe will be effective including, if necessary, a home call by appropriate personnel. Form ABCD 239, Notice of Action, or a substitute form, may be used for this purpose. Every notification shall include:

.431 A statement setting forth the proposed action and the grounds therefor, together with what information, if any, is needed or action required to reestablish eligibility or to determine a correct grant.

.432 Assurance that prompt investigation is being made; that the withheld warrant will be delivered as soon as there is eligibility to receive it; and that the evidence or other information which brought about the withholding action will be freely discussed with the recipient, parent, or other person, if he so desires (see Section .434 below).

.433 A statement of whether, if aid is withheld, the recipient will or will not continue to be certified for medical assistance during the month aid is withheld.

Therefore, the only issue remaining before this court is that raised by the class action which contends that the newly adopted regulations are constitutionally inadequate to afford due process at the pre-termination conference. The class contends that the regulations are insufficient in five respects: (1) the conference is with a county official of the agency which has already determined the question of eligibility rather than before an "impartial" referee; (2) the three day notice requirement is too short; (3) no transcript is required to be made or furnished and the decision is not specifically required to be made only on the evidence presented at the conference; (4) the burden of proof is on the recipient to establish eligibility and not on the county to establish ineligibility, and (5) confrontation and cross-examination are not required.

The constitutionality of the "informal conference" must be determined in light of the fact that even if aid is terminated, the State of California must provide the recipient with the kind of hearing plaintiff seeks.[2] At present such

> .434 A statement that the recipient, parent, or other person may have the opportunity to meet with his caseworker, an eligibility worker, or another responsible person in the county department, at a specified time, or during a given time period which shall not exceed three (3) working days, and the last day of which shall be at least one (1) day prior to the usual delivery date of the warrant, and at a place specifically designated in order to enable the recipient, parent, or other person:
> (a) To learn the nature and extent of the information on which the withholding action is based;
> (b) To provide any explanation or information, including, but not limited to that described in the notification pursuant to Section .431 above;
> (c) To discuss the entire matter informally for purposes of clarification and, where possible, resolution.

2. CAL. WELF. & INST. CODE §§ 10950-10965.

"fair hearing" is required to be given within 45 days[3] and a decision rendered within the next 75 days.[4] As of July 1, 1968, the hearing and decision will be required to be made within 60 days.[5]

The court finds that the present California regulations (see note 1) do comport with the due process clause of the fourteenth amendment to the United States Constitution. The State of California having given Mae Wheeler, the named plaintiff, a fair heairng in which she has been found eligible for O.A.S., and having adopted regulations which assure all within the class due process before termination, the purpose of this action has been achieved and this proceeding may, with propriety, now be dismissed.

It is SO ORDERED.

Dated: April 17, 1968

O. D. HAMLIN
United States Circuit Judge

ALBERT C. WOLLENBERG
United States District Judge

ALFONSO J. ZIRPOLI
United States District Judge

Filed April 19, 1968

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3. CAL. WELF. & INST. CODE § 10952.

4. CAL. WELF. & INST. CODE § 10958.

5. HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION § 6200(j), as set forth in Handbook Transmittal No. 140 (attached to Defendants' Trial Brief as Exh. B), provides as follows:

6200. *Requirements for State Plans*

. . .

(j) Prompt, definitive, and final administrative action will be taken within 60 days from the date of the request for a fair hearing. The claimant will be notified of the decision, in writing, in the name of the State agency and, to the extent it is available to him, of his right to judicial review.

Appendix B

OPINION OF THE COURT BELOW PERMITTING CLASS ACTION AND CERTIFYING NECESSITY OF CONVENING THREE-JUDGE DISTRICT COURT.

United States District Court
For the Northern District of California

No. 48303

Mae Wheeler, individually and on behalf of all others similarly situated,
Plaintiffs,

vs.

John Montgomery, individually and in his capacity as Director of the California State Department of Public Welfare, and Ronald Born, individually and in his capacity as General Manager of the San Francisco City and County Department of Social Services,
Defendants.

MEMORANDUM OPINION AND ORDER DENYING CONTINUANCE, ORDER PARTIALLY VACATING PRIOR ORDER, ORDER PERMITTING CLASS ACTION, ORDER DENYING MOTIONS TO INTERVENE, ORDER DENYING MOTION TO MODIFY TEMPORARY RESTRAINING ORDER, NOTIFICATION AND CERTIFICATION OF NECESSITY OF THREE JUDGE COURT.

FACTS AND PROCEEDINGS TO DATE

Plaintiff has filed a complaint, in forma pauperis, seeking injunctive and declaratory relief against a California welfare practice authorized by state statutes which permit the termination of old age security benefits prior to affording the recipient a hearing on his supposed ineligibility. The

statutes which are involved are CAL. WELF. & INST. CODE §§ 12,200, 12,201. The complaint is in the form of a class action.

The facts alleged pertaining to the named plaintiff are as follows: As of August 30, 1967, Mrs. Wheeler was receiving old age benefits in the amount of $113.95. Defendants received information that Mrs. Wheeler had received some $6,000.00 in insurance proceeds and had transferred the money to her grandson. Defendants determined that Mrs. Wheeler's alleged action rendered her ineligible for continued benefits because she had had more money than the maximum permitted while maintaining eligibility.

Mrs. Wheeler's benefit checks had, at the time the suit was filed, been withheld since September 1, 1967, although she came to receive general assistance in the amount of $53.90 until December 1, 1967, the date on which this court heard argument on the propriety of a temporary restraining order restoring old age benefits and on the need for a three judge court.

On December 6, 1967, this court issued a temporary restraining order to avoid irreparable injury to Mrs. Wheeler, the court having been satisfied by plaintiff's showing that such injury was occurring. The court also stayed further proceedings for thirty days to permit Mrs. Wheeler to appeal to a state referee to adjudicate her dispute with the County of San Francisco.

Prior orders in no way were a determination of the merits of plaintiff's claims, but merely endeavored to preserve the status quo pending the court's determination of the questions involving a three judge court and a class action. The court recognizes that the result of the appeal will in no way affect the existence of a case or controversy between the parties over the constitutionality of the statutes

here challenged. No restraining order was issued applicable to any other member of the alleged class because no showing was made of an imminent threat of irreparable harm. The court expressly allowed appropriate showing to be made as instances of threatened irreparable harm arose.

Since December 6, 1967, plaintiff's counsel have made motions for intervention and a motion for modification of the temporary restraining order to include the entire alleged class. The court deems the showings made with respect to persons other than Mrs. Wheeler inadequate to warrant further injunctive relief at this time.

Defendants' counsel have requested a continuance of the argument scheduled on some of the motions and on the questions of the three judge court and class action. Having heard further argument on December 15, 1967, the court deems that no continuance is necessary, that the pleadings constitute a more-than-adequate record on which to base rulings on the matters now pending before the court, and that the court's duty is to determine certain of the questions involved by referring to the complaint in this action. The court is satisfied that any previous stay of these proceedings to permit further argument has been rendered unnecessary by the court's own examination of the issues involved in this case and by further argument and documents filed by the parties.

JURISDICTION: NEED FOR A THREE JUDGE COURT

Plaintiff's basic contention is that to terminate old age benefits without first giving the recipient a hearing is to deny a recipient due process of law. Plaintiff contends that the right to a hearing prior to termination may be found

either in the due process clause, U.S. Const., amend. 14, or in portions of the Social Security Act, specifically 42 U.S.C. § 1382(a)(4) and certain regulations promulgated pursuant thereto. Plaintiff's attack is merely on the procedural method by which aid is terminated. She disclaims any contention that under the facts as alleged by defendants to exist, aid may not be terminated. She merely says that a hearing on the question of eligibility must be held prior to the termination.

Actually, three potential constitutional challenges lurk in the pleadings of this case: (1) California's termination statutes are repugnant to the due process clause of the fourteenth amendment; (2) California's termination statutes are repugnant to provisions of the Social Security Act; (3) if California's termination statutes are not repugnant to the Act, the Act is repugnant to the due process clause of the fifth amendment. While the second enumerated contention does not require a three judge court, *Swift & Co., Inc. v. Wickham,* 382 U.S. 111 (1965), the first and third do, 28 U.S.C. §§ 2281, 2282.

The requirements of § 2281 are satisfied in this case: a state statute is challenged as repugnant on its face to the federal constitution; an injunction is sought; a state officer is a defendant; the statute has statewide application.

This court cannot say the federal question presented is not substantial in the sense that term is used with reference to the propriety of a three judge court. Just "how much due process" is required is a difficult question to decide when administrative proceedings are involved. Also, the precise question presented—whether a hearing prior to administrative action is required—is a difficult question which has engendered considerable debate and litigation. Though not

resolved, a situation strikingly similar to the one in this case has been presented to and reached the Supreme Court. *Thorpe v. Housing Authority of the City of Durham,* 386 U.S. 670 (1967).

Recent years have seen an increasing number of decisions dealing with the question of public entities attempting to terminate "benefits" without hearings. *E.g., Slochower v. Board of Higher Education of New York City,* 350 U.S. 551 (1956); *Wasson v. Trowbridge,* 382 F. 2d 807 (2d Cir. 1967); *Dixon v. Alabama State Board of Education,* 294 F. 2d 150 (5th Cir. 1961), *cert. denied,* 368 U.S. 930 (1961); *Teel v. Pitt County Board of Education,* 272 F. Supp. 703 (E.D. N.C. 1967). *But cf., e.g., Cafeteria & Restaurant Workers Union v. McElroy,* 367 U.S. 886 (1961); *Vitarelli v. Seaton,* 359 U.S. 535 (1959). See also 1 Davis, Administrative Law §§ 7.04-7.20; Silver, *How to Handle a Welfare Case,* 4 Law in Trans. Q. 87, 100 n. 54 and accompanying text (1967); Note, *Federal Judicial Review of State Welfare Practices,* 67 Colum. L. Rev. 84, 93 (1967). Based on a review of the above and other authorities, this court must conclude that the precise federal question presented by this case is substantial and that a three judge court is required to ultimately dispose of the issues.

CONSIDERATIONS PERTAINING TO A CLASS ACTION

The prayer for declaratory and injunctive relief raises common issues of law for each member of the class; namely, whether a termination of benefits without a prior hearing denies a recipient his rights under the United States Constitution. All members of the class are governed by the same California procedures and statutes.

The court concludes that the prerequisites of Fed. R. Civ. P. 23(a) are satisfied. Similarly, the requirement of Fed. R. Civ. P. 23(b)(2) is satisfied.

The foregoing memorandum opinion and the orders which follow dispose of the matters presently scheduled to be heard on January 2, 1968, and of all other preliminary matters now pending before this court. Hence, absent further pleadings by the parties, no further action or appearances will be required of the parties prior to the convening of the three judge court.

ORDERS

1. The court being satisfied that a continuance would serve no useful purpose in disposing of the merits of this case, It Is Ordered that defendants' motion for a continuance is denied.

2. The court being satisfied that further delay in the resolution of pending matters would not aid the court in ruling on such matters, and the court having examined the pleadings and authorities relevant to the rulings made this day, It Is Ordered that any prior order of this court is vacated to the extent such order stayed further proceedings preliminary to the court's ruling on any matter ruled upon this day.

3. Pursuant to Fed. R. Civ. P. 23(a), (b)(2), (c)(1), and (d)(2), It Is Ordered that a class action for declaratory and injunctive relief may be maintained, the class to consist of all recipients of old age benefits subject to California termination statutes, and that plaintiff shall forward to the United States Attorney at San Francisco and to the Secretary of the Department of Health, Education and Welfare, notice of the pendency of this action, together with a copy of the pleadings heretofore filed with the court

and with a copy of this memorandum opinion and these orders.

4. The court being satisfied that the showings heretofore made on behalf of the putative intervenors are not substantial enough to require intervention, and the court being satisfied that the rights of all members of the class will be protected without the intervention, It Is Ordered that all motions to intervene on file on the date of this order are denied.

5. The court being satisfied that the showings heretofore made in support of the motion to modify the temporary restraining order are insufficient to justify further injunctive relief at this time by this court, It Is Ordered that the motion to modify the temporary restraining order is denied without prejudice to such reconsideration as may be appropriate of requests for interim relief.

6. The court will notify the chief judge of the ninth circuit that in this court's opinion a three judge court is required to resolve the issues in this case.

Dated: December 20, 1967

ALFONSO J. ZIRPOLI
United States District Judge

Filed Feb. 20, 1967

Appendix C

TEMPORARY RESTRAINING ORDER ISSUED BY THE COURT BELOW

In the United States District Court
for the Northern District of California, Southern Division

Civil Action No. 48303

Mae Wheeler, et al.,
Plaintiffs,

v.

John Montgomery, et al.,
Defendants.

TEMPORARY RESTRAINING ORDER

The plaintiffs have filed this action to declare unconstitutional California Welfare & Institutions Code Sections 12,200, 12,201 and 10,950, which authorizes the termination, suspension or revocation of financial aid under the Old Age (OAS) program prior to the granting of reasonable and adequate notice and opportunity for a hearing. They have made application for the hearing of this cause for a declaratory judgment, preliminary and permanent injunction before a Three-Judge District Court pursuant to Title 28, United States Code, Sections 2281 and 2284.

This action coming on to be heard on December 1, 1967, on the motion of plaintiffs for a temporary restraining order, and adequate notice having been given to defendants; and the Court having considered the affidavits and memoranda presented and the arguments of counsel for all parties, and being fully advised in the premises, it makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Defendants withheld and thereafter terminated plaintiff Mae Wheeler's aid under the OAS program without affording her reasonable notice and an opportunity for a prior hearing.

2. Plaintiff Mae Wheeler's minimum monthly need as of August 31, 1967 was determined by defendants to be $158.55 and was met through direct Social Security benefits of $44.60 and an Old Age Security grant of $113.95. As a consequence of the termination of Old Age Security, she now has been promised County General Assistance in the sum of $53.90 a month which, when added to her direct Social Security payments totals $98.50 a month.

3. Defendants have refused plaintiff Mae Wheeler's request for restoration and continuation of aid under the OAS program.

4. Defendants' withdrawal and termination of aid and their continued refusal to reinstate plaintiff Mae Wheeler's aid has caused and is causing plaintiff Mae Wheeler immediate and irreparable injury in that she will not have sufficient funds with which to subsist on a day-to-day basis without her full OAS payment.

5. Irreparable injury has been shown only with respect to plaintiff Mae Wheeler and no proof so far has been presented of any others in the class who are likely to suffer immediate and irreparable injury.

CONCLUSIONS OF LAW

Defendants' termination of plaintiff Mae Wheeler's aid under the OAS program pursuant to California Welfare & Institutions Code Sections 12,200 and 12,201 and the regulations promulgated thereunder without a prior hearing and reasonable notice raises a substantial question as to

whether the due process clause of the Fourteenth Amendment to the U.S. Constitution has been violated.

Upon the foregoing, it is, by the United States District Court for the Northern District of California, Southern Division, this 1st day of December, 1967

ORDERED:

1. That the defendants John Montgomery and Ronald Born, their agents, servants, and employees be, and they are hereby restrained effective December 1, 1967 from enforcing against the plaintiff Mae Wheeler the provisions of the California Welfare and Institutions Code Sections 12,200, 12,201, and 10,950, et seq., and implementing the Rules and Regulations of the State Department of Social Welfare, so that Old Age Assistance shall be restored to plaintiff Mae Wheeler forthwith in the amount to which she may be found eligible in order to meet her needs as established under the Old Age Security program until such time as a determination is made by this Court regarding plaintiff's application for convening a Three-Judge Court pursuant to Title 28 U.S.C. 2281 and 2284.

2. That action on plaintiff's application for the convening of a Three-Judge Court shall be deferred for 30 days until January 2, 1968, at 5 p.m. without prejudice to any of the parties herein.

ALFONSO J. ZIRPOLI
District Court Judge

Signed on December 6, 1967.

APPROVED AS TO FORM:
THOMAS C. LYNCH
Attorney General

By ELIZABETH PALMER
Deputy Attorney General

Attorneys for Defendant
JOHN MONTGOMERY

THOMAS M. O'CONNOR,
City Attorney

By.....
Raymond D. Williamson, Jr.
Deputy City Attorney
Attorneys for Defendant Ronald Born

Appendix D

CALIFORNIA WELFARE AND INSTITUTIONS CODE

1. Statutes Governing Suspension of Old Age Security.

§ 12200. Grounds; report of suspension; effect of eligibility for medical assistance. The county may for cause, and upon instructions so to do by the department, shall cancel, suspend, or revoke aid. Upon request of the department, an immediate report of every suspension shall be made to the department stating the reason for the suspension and showing the action of the board of supervisors in approving the suspension.

Eligibility for medical assistance for the aged does not constitute cause for retroactive cancellation, suspension, or revocation of aid.

§ 12201. Notice to recipient. If the board of supervisors, in accordance with Section 12200, cancels, suspends, or revokes aid, the recipient shall be immediately notified in writing of the county's action, the date thereof, and of the reason therefor and the recipient's right to appeal therefrom.

2. Fair Hearing Statutes.

§ 10950. Opportunity; recipient defined. If any applicant for or recipient of public social services is dissatisfied with any action of the county department relating to his application for or receipt of aid or services, or if his application is not acted upon with reasonable promptness, or if any person who desires to apply for such aid or services is refused the opportunity to submit a signed application therefor, and is dissatisfied with such refusal, he shall, in person or through an authorized representative, without the necessity of filing a claim with the board of supervisors,

upon filing a request with the department, be accorded an opportunity for a fair hearing.

As used in this chapter, "recipient" means an applicant for or recipient of aid or services except aid or services exclusively financed by county funds.

§ 10951. Request; time. No person shall be entitled to a hearing pursuant to this chapter unless he files his request for the same within one year after the order or action complained of.

§ 10952. Setting; notice. The department shall set the hearing to commence within 45 days after the request is filed, and, at least 10 days prior to the hearing, shall give all parties concerned written notice of the time and place of the hearing.

§ 10953. Conduct. A hearing under this chapter shall be conducted by referees employed by the department, unless the director orders that it shall be conducted by himself or by the administrative adviser of the department in behalf of the director.

§ 10954. Powers of person conducting. The director, administrative adviser, or referee, in conducting the hearing, shall have all of the powers and authority conferred upon the head of a department in Article 2 (commencing with Section 11180) of Chapter 2 of Part 1 of Division 3 of Title 2 of the Government Code.

§ 10955. Impartiality; informality; evidence; appearance; counsel. The hearing shall be conducted in an impartial and informal manner in order to encourage free and open discussion by participants. All testimony shall be submitted under oath or affirmation. The person conducting the hearing shall not be bound by rules of procedure or evidence applicable in judicial proceedings. At the hearing the appli-

cant or recipient may appear in person with counsel of his own choosing, or in person and without such counsel.

§ 10956. Perpetuation of proceedings. The proceedings at the hearing shall be reported by a phonographic reporter or otherwise perpetuated by mechanical, electronic, or other means capable of reproduction or transcription.

§ 10957. Continuance; commencement of payments on award of aid. The person conducting the hearing, upon good cause shown, may continue the hearing for a period of not to exceed 30 days. When the refusal of a county to accept a signed application for aid or services is an issue, the director may require the county to accept the application, and may continue the case until the results of the investigation have been reported to him. In any such case in which aid is awarded by the director, the payments shall commence at the time indicated by the director.

§ 10958. Referee; proposed decision. If the hearing is conducted by a referee, he shall prepare a proposed decision, in writing and in such form that it may be adopted as the decision in the case, and, after approval of the decision by the chief referee of the department, shall file a copy of the proposed decision, within 75 days after the conclusion of the hearing, with the director.

§ 10959. Director's powers after receipt of proposed decision; rehearing. Within 30 days after receiving a copy of the referee's proposed decision, the director may adopt the decision in its entirety; decide the matter himself on the record, including the transcript, with or without taking additional evidence; or order a rehearing to be conducted by himself, the administrative adviser of the department or another referee in behalf of the director. If the director decides the matter, a copy of his decision shall be served on the applicant or recipient and on the affected county,

and, if his decision differs materially from the proposed decision of the referee, a copy of that proposed decision shall also be served on the applicant or recipient and on the affected county. If a rehearing is ordered, it shall be conducted in the same manner and within the same time limits specified for the original hearing.

§ 10960. Request for rehearing; time; ruling; conduct. Within 30 days after adoption by the director of the proposed decision of a referee or the issuance by the director of his own decision, the affected county or applicant or recipient may file a request with the director for a rehearing and the director, within 10 days after receipt of the request, shall grant or deny the request. If the director grants the request, the rehearing shall be conducted in the same manner and subject to the same time limits as the original hearing.

§ 10961. Director's decision; contents; effect. The decision of the director need not specify the amount of the award to be paid unless the amount of the award is an issue. If the decision is in favor of the applicant or recipient, the county department shall pay to the applicant or recipient, without the necessity of establishing his present need, the amount of aid he is entitled to receive pursuant to the director's decision, payment to commence as of the date the person was first entitled thereto, or grant to him the services to which the director finds he is entitled.

§ 10962. Judicial review. After having exhausted the administrative remedy provided for in Section 10960, the applicant or recipient or the affected county, within one year after receiving notice of the director's final decision, may file a petition with the superior court, under the provisions of Section 1094.5 of the Code of Civil Procedure,

praying for a review of the entire proceedings in the matter, upon questions of law involved in the case. Such review, if granted, shall be the exclusive remedy available to the applicant or recipient or county for review of the director's decision. The director shall be the sole respondent in such proceedings.

No filing fee shall be required for the filing of a petition pursuant to this section. Any such petition to the superior court shall be entitled to a preference in setting a date for hearing on the petition. No bond shall be required in the case of any petition for review, nor in any appeal therefrom. The applicant or recipient shall be entitled to reasonable attorney's fees and costs, if he obtains a decision in his favor.

§ 10963. Compliance with decision. The county director shall comply with and execute every decision of the director rendered pursuant to this chapter.

§ 10964. Digest of decisions. The department shall compile and distribute to each county department a current digest of decisions, properly indexed, rendered under this chapter, and each such digest shall be open to public inspection, subject, however, to the confidentiality requirements set forth in federal and state laws and regulations.

§ 10965. Request on behalf of decedent's estate. Nothing in this chapter shall prevent the filing of the request for a hearing by the legal representative, or, if there is no authorized legal representative, by an heir of a deceased applicant or recipient, in behalf of the decedent's estate, to the end that rights not determined at the time of death shall accrue to the estate of the applicant or recipient.

Appendix E

CALIFORNIA'S RULES FOR WITHHOLDING WELFARE PAYMENTS PRIOR TO THE CONVENING OF THREE-JUDGE COURT BELOW.

California State Department of Social Welfare, Public Social Services Manual:

44-325. CHANGES IN AMOUNT OF PAYMENT

.4 *Withheld Payment* (AB, ATD, OAS, AFDC).

.41 Withheld Payment—Defined

A withheld payment is one which is held beyond the usual delivery date while information concerning needs, income or basic eligibility is investigated.

.42 Limitations on and Requirements for Withholding of Aid Payment

Subject to the following limitations, aid payments shall be withheld when further investigation is necessary to determine continuing eligibility.

.421 Recipients should have the assurance of regular and continued aid payments without interruption or delay. Accordingly, an aid payment may be withheld beyond the usual delivery date only when evidence which is both substantial in nature and reliable in source is received by the county, indicating:

a. Probable ineligibility of the recipient, or

b. A probable overpayment has occurred or is occurring which can be adjusted only if aid payment is withheld.

.422 (AB, ATD, OAS, AFDC) Aid payment shall not be withheld pending ascertainment of increases in federal benefits such as social security or in-

increases in benefits payable by a public agency. (W&IC Section 11014.)

.423 Aid payment shall not be withheld because of actual or probable changes in need or income when it appears that any resulting overpayment can be adjusted in the grant(s) for a subsequent month or months. (See Section 44-335.) (If a recipient will be disadvantaged by delaying the adjustment another month, the county should discuss with the recipient the desirability of an immediate current cash adjustment for the overpayment in lieu of the delayed grant adjustment.)

.424 An initial payment shall not be withheld beyond the month for which it was authorized.

.425 (AFDC) The first installment of a month's *AFDC* aid payment may be withheld if the county's evaluation of circumstances indicates possible ineligibility. If the question cannot be resolved by the end of the first semi-monthly period following that in which it arose, the second payment is always withheld.

Unless the first installment of a month's aid payment has been withheld, the second installment is never withheld except when:

a. Probable or actual ineligibility for the first installment was discovered too late to hold that payment, or

b. Probable overpayment is occurring which can can be adjusted only if the second installment is withheld or if the recipient would be seriously disadvantaged by the delayed adjustment.

For counties on the Subsequent Payment Plan the second installment is never withheld because of changes occurring within the current payment period.

.43 (AB, ATD, OAS, AFDC) Notification to Recipient When Aid Payment is Withheld

The recipient, the parent or other person responsible for the child in *AFDC,* is to be notified immediately when a warrant is withheld beyond its usual delivery date for any reason other than death. Form ABCD 239, Notice of Action, or a substitute form with the same information shall be used for this notification. Every notification shall also include:

.431 A statement of what information, if any, is needed or action required to establish eligibility or to determine a correct grant.

.432 Assurance that prompt investigation will be made and the withheld warrant delivered if there is eligibility to receive it.

.433 A statement of whether the recipient will or will not continue to be certified for medical assistance during the month aid is withheld.

Appendix F

EXCERPTS FROM REVISED CALIFORNIA RULES FOR WITHHOLDING WELFARE PAYMENTS ESTABLISHING "INFORMAL CONFERENCE" EFFECTIVE APRIL 1, 1968.

California State Department of Social Welfare, Public Social Services Manual:

44-325 CHANGES IN AMOUNT OF PAYMENT

.43 *Notification to Recipient When Aid Payment is Withheld* (AB, ATD, OAS, AFDC)

The recipient, the parent or other person responsible for the child in *AFDC,* shall be notified, in writing, immediately upon the initial decision being made to withhold a warrant beyond its usual delivery date for any reason other than death, and in no case less than three (3) mail delivery days prior to the usual delivery date of the warrant to the recipient. The county shall give such notice as it has reason to believe will be effective including, if necessary, a home call by appropriate personnel. Form ABCD 239, Notice of Action, or a substitute form, may be used for this purpose. Every notification shall include:

.431 A statement setting forth the proposed action and the grounds therefor, together with what information, if any, is needed or action required to reestablish eligibility or to determine a correct grant.

.432 Assurance that prompt investigation is being made; that the withheld warrant will be delivered as soon as there is eligibility to receive it; and that the evidence or other information which brought about the withholding action will be freely discussed with the recipient, parent, or

other person, if he so desires (see Section .434 below).

.433 A statement of whether, if aid is withheld, the recipient will or will not continue to be certified for medical assistance during the month aid is withheld.

.434 A statement that the recipient, parent, or other person may have the opportunity to meet with his caseworker, an eligibility worker, or another responsible person in the county department, at a specified time, or during a given time period which shall not exceed three (3) working days, and the last day of which shall be at least one (1) day prior to the usual delivery date of the warrant, and at a place specifically designated in order to enable the recipient, parent, or other person:

(a) To learn the nature and extent of the information on which the withholding action is based;

(b) To provide any explanation or information, including, but not limited to that described in the notification pursuant to Section .431 above;

(c) To discuss the entire matter informally for purposes of clarification and, where possible, resolution.

Appendix G

FINDINGS OF FACT AND CONCLUSIONS OF LAW McCULLOUGH v. TERZIAN

In the Superior Court of the State of California in and for the County of Alameda

No. 379011

Mary McCullough, Melvin McCullough, Michael Johnson and Rosaline Johnson, by their Guardian Ad Litem Mary McCullough, individually and on behalf of all persons receiving Public Assistance under the Categorical Aid Programs in the State of California,

Petitioners,

vs

Hrayr Terzian, Director of the Alameda County Welfare Department, John Montgomery, Director of the Department of Social Welfare of the State of California,

Respondents.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for hearing before Department One of the above-entitled court, Honorable Lewis E. Lercara presiding, on April 25, 1968. Petitioners having filed their petition for writ of mandate and Complaint for declaratory relief, appeared by David Nawi of the Legal Aid Society of Alameda County. Respondent John Montgomery, Director of the State Department of Social Welfare, and, Respondent, Hrayr Terzian, Director of the Alameda County Welfare Department, appeared by Elizabeth Palmer, Deputy Attorney General and Ben H. Zuppan,

Deputy County Counsel. A Stipulation of Facts having been filed, arguments having been presented and the matter having been submitted for decision, the Court makes the following:

FINDINGS OF FACT

1. At all times relevant herein, petitioners Melvin McCullough, age three, Rosaline Johnson, age two, Michael Johnson, age one and Mary McCullough, their mother, were recipients of public assistance under the State Aid to Families with Dependent Children and, until April 1, 1968, they were receiving $209.00 per month for their maintenance and support from the Alameda County Welfare Department.

2. Respondent, John Montgomery, is the Director of the Department of Social Welfare for the State of California and is charged with the state-wide administration of the laws pertaining to Public Social Services, including Welfare and Institutions Code Section 11458.

Respondent, John Montgomery is the only person authorized to adopt regulations to implement the laws relating to public social services in California.

Respondent, Hrayr Terzian, is the Director of the Alameda County Welfare Department and is responsible for the administration of the laws and regulations governing public social services program, including Aid to Families with Dependent Children, in the County of Alameda.

3. On or about March 26, 1968 the Alameda County Welfare Department notified petitioner, by mail, that the warrants due on April 1 and April 16 had been withheld for "clarification of current living arrangement due to FSD report of man in the home since June, 1967". On or about March 27, 1968, petitioner was visited by her social

worker. Her eligibility was discussed and she was advised that if she admitted that a man was or had been living with her, her grant would be adjusted—that if she denied it, she would receive no further benefits. Petitioner denied the allegations and on or about March 29, 1968, she received a County "Notice of Action" form stating that her "case is being discontinued effective 3/31/68 because of failure to provide essential information." A fair hearing was requested by petitioners on March 28, 1968.

4. The notices sent petitioner provided that she could discuss her problem with her social worker and that all facts and any further information she wished to present would be given careful consideration.

5. Respondents have substantially complied with the provisions of State Department of Social Welfare Public Social Services Manual Section 44-325.43.

6. Petitioners do not have the means necessary to maintain a minimum level of subsistence and will suffer undue hardship and irreparable injury by reason of the withholding of benefits.

7. Petitioners represent the class of persons receiving public assistance under categorical aid programs in the State of California. The class is so numerous that the joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the representative parties are typical of the class; and the representative parties will fairly and adequately represent the class.

CONCLUSIONS OF LAW

1. That the W & I Code and the due process clauses of the U. S. and California Constitutions require a hearing prior to the termination, withdrawal or suspension of aid

to recipients of public assistance under categorical aid programs.

2. That the hearing required must as a minimum provide for a decision to be made by an impartial person or body not previously connected with the case and that the decision be based solely on the evidence presented at a hearing pursuant to elementary procedural safeguards.

3. That respondents failed to provide petitioner Mary McCullough such a hearing prior to the termination of her aid and section 44-325.43 does not provide the hearing required.

4. That petitioners have no plain, speedy and adequate remedy in the ordinary course of law and have no adequate administrative remedy available to them.

5. That judgment should issue accordingly.

Dated: May 2 1968

LEWIS E LERCARA
Judge of the Superior Court

Filed May 2, 1968

Appendix H

JUDGMENT—McCULLOUGH v. TERZIAN

Endorsed—Filed May 2, 1968
Jack G. Blue, County Clerk
Thomas E. Donato, Deputy

In the Superior Court of the State of California in and for the County of Alameda

No. 379011

Mary McCullough, Melvin McCullough, Michael Johnson and Rosaline Johnson, by their Guardian Ad Litem Mary McCullough, individually and on behalf of all persons receiving Public Assistance under the Categorical Aid Programs in the State of California,

Petitioners,

vs

Hrayr Terzian, Director of the Alameda County Welfare Department, John Montgomery, Director of the Department of Social Welfare of the State of California,

Respondents.

JUDGMENT

This matter came on for hearing before Department One of the above-entitled court, Honorable Lewis E. Lercara presiding, on April 25, 1968. Petitioners having filed their petition for writ of mandate and complaint for declaratory relief, appeared by David Nawi of the Legal Aid Society of Alameda County, Respondent John Montgomery, Director of the State Department of Social Welfare, and Hrayr Terzian, Director of the Alameda County Welfare Depart-

ment, appeared by Elizabeth Palmer, Deputy Attorney General and Ben H. Zuppan, Deputy County Counsel. A Stipulation of Facts having been filed, arguments having been presented and the matter having been submitted for decision, and the Court having made Findings of Fact and Conclusions of Law which have been signed and filed,

It Is Ordered That:

A Peremptory Writ of Mandate shall issue from this Court commanding respondents John Montgomery, Director of the State Department of Social Welfare, and Hrayr Terzian, Director of the Alameda County Welfare Department, and each of them to set aside and reconsider their action withdrawing aid under the Aid to Families with Dependent Children (AFDC) program from petitioners Mary McCullough, Melvin McCullough, Michael Johnson and Rosaline Johnson in light of this Court's Findings of Fact and Conclusions of Law and to:

1. Provide said petitioners with the assistance to which they are otherwise entitled without regard to any adjustment required by or based on the determination of the Alameda County Welfare Department that a man is or was living in the home of petitioners;

2. Provide the fair hearing and decision requested by said petitioners pursuant to the provisions of Section 10950 et seq. of the W & I Code within thirty days hereof;

3. Provide said aid as of April 1, 1968 and continue to provide said aid until such time that a determination if any of ineligibility is rendered pursuant to said hearing, provided that respondents may require petitioner Mary McCullough to complete an affirmation of eligibility form CA-201 as a condition of the continuation of said payments.

It Is Declared That:

Section 44-325 of the State Department of Social Welfare, Public Social Services Manual before and as amended effective April 1, 1968 is invalid because and to the extent that it does not provide a hearing with adequate procedural safeguards including a decision based solely on the evidence produced at the hearing and rendered by an impartial person or body not previously connected with the case, prior to the withdrawal or termination of public assistance benefits under the Aid to Families with Dependent Children, Old Age Security, Aid to Needy Disabled and Aid to Blind programs as required by State law and United States and California Constitutions.

It Is Further Ordered That a peremptory writ of mandate shall issue from this court commanding respondent John Montgomery, Director of the State Department of Social Welfare to:

Restore or continue to provide the public assistance benefit to which recipients are otherwise entitled under the AFDC, Old Age Security, Aid to Disabled and Aid to Blind programs, whose benefits will be or have been terminated under said programs until a decision if any of ineligibility is rendered after a hearing provided by W & I Code section 10950 et seq. or the equivalent thereof.

Provided that no public assistance benefits under said programs may be terminated or withheld without the advance written notice required by Public Social Services Manual Section 44-325.43.

Provided further that to be eligible for the relief afforded herein the affected recipients must file with the State Department of Social Welfare a request for a fair hearing provided by W & I Code section 10950 et seq. and that such recipients must file with the County Department adminis-

tering aid a sworn statement in writing which controverts the essential allegations of ineligibility and which includes a statement of all current income and resources the aid shall be restored from the date of filing of the request for fair hearing, or the date of filing the above-described statement with the County Department, whichever shall be later;

Provided further that any recipient whose aid has already been withheld or terminated prior to the date hereof and who had not received a fair hearing decision or who is eligible for a fair hearing under the law may file the statement above-described with the County Department and the request for fair hearing and thereupon shall be restored to aid as above provided.

Dated: May 2, 1968

/s/ LEWIS E. LERCARA
Judge of the Superior Court

Filed May 2, 1968

Appendix I

OPINION

KELLY, ET AL. v. WYMAN, ET AL.,
SHEAFE, ET AL. v. WYMAN, ET AL.

United States District Court
Southern District of New York

John Kelly, et al., *Plaintiffs,* —against— George K. Wyman, et al., *Defendants.*	68 Civ. 394
Ruby Sheafe, et al., *Plaintiffs,* —against— George K. Wyman, et al., *Defendants.*	68 Civ. 864

MEMORANDUM

Bryan, District Judge:

The present suit is one of the growing number in which welfare recipients are challenging the fairness of the procedures by which the system of public assistance is administered. See, e.g., Thompson v. Shapiro, 270 F. Supp. 331 (D. Conn. 1967), prob. juris. noted, 36 U.S.L. Week 813 (Jan. 15, 1968); Smith v. King, 277 F. Supp. 331 (M. D. Ala. 1967), prob. juris. noted, 36 U.S.L. Week 3297. The eight individual plaintiffs in this consolidated action are all New York City residents whose welfare assistance has been terminated without a prior hearing. They attack the validity of the rules and regulations promulgated by the defendants—the Commissioner of the State Department of Social Services, the individual members of the State Board

of Social Welfare, and the Commissioner of the New York City Department of Social Services—which permitted termination of assistance prior to hearing.

The complaint, seeking declaratory and injunctive relief, is based on the Civil Rights Act, 42 U.S.C. § 1983. Jurisdiction is alleged under 28 U.S.C. §§ 1343(3)(4). Plaintiffs have moved for convocation of a three-judge court pursuant to 28 U.S.C. §§ 2281-84, a preliminary injunction, and a class action order pursuant to Rule 23(c), F.R.C.P. Defendants have moved to dismiss the complaint for failure to state a claim upon which relief can be granted, for mootness, and for want of standing to sue.

The individual plaintiffs fall into two groups. Four of them—Kelley, Young, DeJesus and Sheafe—were recipients of Home Relief pursuant to N.Y. Soc. Welfare Law §§ 167-65, a state and locally funded program not subject to the requirements of the Social Security Act. At the time this complaint was filed, the state regulations evidently did not require a hearing either prior or subsequent to termination of home relief assistance. On January 16, 1968, however, the defendant State Board amended the regulations concerning fair hearings subsequent to termination and made them applicable to Home Relief recipients. See 18 N.Y.C.R.R. pt. 84.3-.23. In addition, home relief recipients are evidently covered by the new procedure for a limited local review prior to termination, pursuant to Regulation 351.26 of the State Department of Social Services, promulgated April 26, 1968.[1]

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1. When this suit was commenced no prior hearing of any sort was provided. In response to the present action, and similar actions in other states, the State Department promulgated Regulation 351.26, effective March 1, 1968. This regulation was unacceptable to the City Department. After negotiations between the City and State Department the new regulation, which provides local agencies with two options, was adopted.

The remaining four plaintiffs—McKinney, Frye, Guzman and Lett—were recipients of Aid to Dependent Children. N.Y. Soc. Welfare Law §§ 343-62. ADC is one of the federally assisted categorical aid programs administered under the Social Security Law, 42 U.S.C. §§ 601-09 (1964), as amended (Supp. I, 1965). Pursuant to the mandate of the federal statute,[2] 42 U.S.C. § 602(a)(4), the state statute provides a fair hearing subsequent to termination. N.Y. Soc. Welfare Law § 353. Present recipients of ADC faced with termination would also be entitled to the notice and local review provided by new Regulation 351.26, and the New York City plan implementing that regulation approved by the State Department May 1, 1968.

The plaintiffs' basic claim is that the state cannot, consonant with due process, terminate public assistance without affording the recipient a prior hearing. They point to the cases requiring a hearing at a meaningful point in the administrative process,[3] and argue that the extraordinary hardship worked upon a recipient by loss of aid compels the conclusion that the meaningful point for hearing is

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2. While § 602(a)(4) is not clear as to when a fair hearing must be held, the HEW regulation thereunder implies that a hearing after termination or suspension is sufficient. See HEW, Handbook of Public Assistance Administration pt. IV, § 6331. A claim of inconsistency between a state statute or regulation and a federal statute, however, does not warrant convocation of a three-judge court. Swift & Co., Inc. v. Wickham, 382 U.S. 111 (1965). But if the jurisdiction of the three-judge court is otherwise properly invoked, it is free to decide the case on the ground that the state statute conflicts with the federal law, or that the federal regulation is not authorized by the federal statute. See United States v. Georgia Public Service Comm'n, 371 U.S. 285 (1963); Sterling v. Constantin, 287 U.S. 378 (1932).

3. See Opp Cotton Mills, Inc. v. Administrator, 312 U.S. 126, 152-53 (1941); Morgan v. United States, 304 U.S. 1 (1938); Londoner v. Denver, 210 U.S. 373 (1908); compare Armstrong v. Manzo, 380 U.S. 545 (1965); Thorpe v. Housing Authority of Durham, 386 U.S. 670 (1967).

prior to termination. See Note, Withdrawal of Public Welfare: The Right to a Prior Hearing, 76 Yale L.J. 1234 (1967). The defendants apparently agree with this proposition, since, as explained earlier, they have amended the rules to provide for review at the local level prior to termination. In supplementary filed papers, the plaintiffs have challenged the adequacy of the procedures provided by new Regulation 351.26 to satisfy the requirements of due process.

I.

Does the case in its present posture require convocation of a three-judge court? The defendants raise several objections at the outset.

First, they argue that the individual plaintiffs, having failed to invoke the fair hearing procedure after their terminations, have not exhausted their available remedies. While this procedure would only have been available to four of the plaintiffs, in my view exhaustion of a remedy of this sort is not required in a case brought under 42 U.S.C. § 1983. See Damico v. California, 389 U.S. 416 (1967) (per curiam); McNeese v. Board of Education, 373 U.S. 668 (1963).

Second, defendants urge that the case is moot, based on affidavits showing that most of the plaintiffs are now receiving public assistance on an emergency basis. Judicial determination of questions of this importance cannot thus be evaded and, in any event, dismissal is not appropriate when the individuals purport to represent a class.

Finally, noting that the thrust of plaintiffs' complaint is directed at state and local administrative regulations, defendants argue that a three-judge court is not required under 28 U.S.C. § 2281. This claim is not without merit, particularly in view of the traditional reluctance of courts, based on needs of judicial economy, to invoke the three-

judge procedure. See United States v. Interstate Commerce Commission, 337 U.S. 426 (1949); Utica Mutual Ins. Co. v. Vincent, 375 F.2d 129, 130-31 (2d Cir. 1967). However, where the regulations are of broad applicability, and embody legislative policy on a state-wide basis, three-judge courts have been deemed appropriate. See Oklahoma Gas Co. v. Russell, 261 U.S. 290 (1923); Note, Federal Review of State Welfare Practices, 67 Colum. L. Rev. 84, 106-08 (1967); compare McWood Corp. v. State Corporate Comm'n, 237 F. Supp. 963 (D. N.M. 1965). In my view, a three-judge court is appropriate where, as here, the regulations attacked implement important state social and economic policy.

II.

The remaining question is whether the constitutional issues presented by the complaint, in the present posture of the case, are substantial. Defendants urge that the procedures provided by Regulation 351.26 fully satisfy the requirements of due process and, in essence, meet the demands of the original complaint. Plaintiffs, on the other hand, claim several deficiencies in the new procedures and to illustrate their objections, contrast the new regulation with the procedures provided upon a fair hearing after termination. Specifically, they complain that the new procedures do not provide for confrontation and cross-examination of witnesses, or for an independent hearing examiner.[4] The rules governing fair hearings, on the other hand, plainly provide for confrontation and cross-exam-

4. Regulation 351.26 provides local agencies with two options. Under subdivision (a) the local agency must give seven days written notice before suspension of aid, specifying the reasons for suspension. The recipient is entitled to appear before a local social services official occupying a position superior to the person who approved the suspension, and present oral and written relevant evidence and reasons on his behalf, with the aid of counsel or other representative. The official then reviews the evidence with

ination, and are held before state hearing officers specially employed for this purpose. In short, plaintiffs' demand is for a trial-type hearing prior to termination, rather than a documentary review.

Cases requiring that administrative hearings be held before agency action directly affecting personal well-being becomes final are increasingly common. See, e.g., Gonzalez v. Freeman, 334 F.2d 570 (D.C.Cir. 1964); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964); Homer v. Richmond, 292 F.2d 729 (D.C.Cir. 1961). These cases, however, shed little light on the type of hearing required. One test which seems to be evolving requires the court to balance the private right against the government interest to determine the nature of the hearing. See Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967); Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir. 1961). A trial-type hearing is more often required where the matter to be adjudicated relates to an individual's eligibility under or compliance with established standards, rather than a question of the validity of the standards themselves. See Willner v. Committee on Character, 373 U.S. 96 (1963); Goldsmith v. Board of Tax Appeals, 270 U.S. 117 (1926); 1 Davis, Administrative Law §§ 7.01-.05 (1958 & Supp. 1965).[5] In resolving ques-

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the recipient and his representative and makes his decision.

Under subdivision (b), the option elected by New York City, the same notice requirements prevail. No oral evidence or witnesses, however, are permitted. The recipient or his representative is only entitled to submit in writing a statement or other evidence demonstrating why his grant should be continued. The local official then reviews the case file, and the statement submitted by the recipient, and makes his determination.

5. Where the questions presented raise only issues of law, trial-type hearings are not required. See F.C.C. v. W.J.R., 337 U.S. 265 (1949). Nor is confrontation or cross-examination required where the hearing is deemed investigatory, see Hannah v. Larche, 363 U.S. 420 (1960); Anonymous No. 6 v. Baker, 360 U.S. 287 (1959), or the ruling made is simply advisory. See Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294 (1933).

tions of a factual nature, it is felt that the traditional safeguards of confrontation and cross-examination are required. Cf. Greene v. McElroy, 360 U.S. 474 (1959).

In my view the question of whether a trial-type hearing is required before termination of welfare benefits presents a substantial constitutional issue. The burden placed upon the state and local governments by having to continue to make payments during the pendency of the hearing and decision is slight and has already been assumed by them under the present regulation. The demand that full hearings would make upon agency manpower and funds is no doubt more substantial. When contrasted, however, with the plight of a recipient cut off from all aid while waiting for a full hearing upon appeal to the state agency, I cannot say that the answer is so clear as to make the issue presented constitutionally insubstantial.

It should also be pointed out that the type of questions presented by the terminations alleged in the complaint appear to be questions of fact going to the eligibility of the recipients for aid under present standards. The complaint does not challenge any of the standards purportedly relied on by the defendants in terminating assistance, but only the application of those standards to the individual plaintiffs. Questions of this sort are customarily resolved by trial-type hearings.

Finally, in three other cases presenting similar issues, three-judge courts have been convoked. See Williams v. Gandy, Civ. No. GC6728 (N.D.Miss.1967); Wheeler v. Montgomery, Civ. No. 48303 (W.D.Calif.1967); Laze v. Downing, Civ. No. 7-2089-C-2 (S.D. Iowa 1967). Consequently, I conclude that the issues presented by this complaint are not insubstantial and should be heard by a three-judge court pursuant to 28 U.S.C. §§ 2281-84.

III.

Plaintiffs have also moved for an order pursuant to Rule 23(c) F.R.C.P., permitting this case to be maintained as a class action. That rule provides that such a determination shall be made "as soon as practicable after the commencement of an action brought as a class action." While it may be that common questions of law and fact are present here, none of the parties has submitted facts from which I could determine the membership of the class, the adequacy of plaintiffs' representation of the class, the question of possible sub-classes, or the type of notice which would be required. Therefore, I conclude that it is not yet practicable to make the determination required by Rule 23(c).

IV.

Plaintiffs also pray for a temporary injunction directing that defendants restore the individual plaintiffs to the welfare rolls and refrain from terminating benefits of other recipients without prior hearings. Since it appears that the individual plaintiffs are presently receiving some benefits, at least on an emergency basis, and in view of the promulgation of the new regulations providing for a form of hearing prior to termination, I do not feel that a temporary injunction is required at this time pending hearing before the full court on the merits.

V.

In accordance with these views, I will notify the Chief Judge of this Circuit that the consolidated action should be heard before a three-judge court pursuant to 28 U.S.C. §§ 2281-84. The defendants' motion to dismiss for failure to state a claim upon which relief can be granted should

also be heard before the full court. Plaintiffs' motion for temporary injunctive relief is denied.

It is so ordered.

Dated: New York N.Y.
May 17, 1968

/s/ FREDERICK vP. BRYAN
United States District Judge

Appendix J

EXCERPTS FROM PART IV OF THE HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE.

Handbook of Public Assistance Administration
Part IV Eligibility, Assistance, and Services

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6000. *Fair Hearings*

6100. *Provisions of the Act*

(a) Sections 2(a)(4), 402(a)(4), 1002(a)(4), 1402(a)(4), and 1602(a)(4) read as follows:

"A State plan . . . must . . .

"provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for . . . [aid or assistance under the plan] is denied or is not acted upon with reasonable promptness."

(b) Sections 6(a)(5), 406(b)(2)(E), 1006(5), 1405(5), and 1605(a)(E) authorize Federal financial parti-

cipation in protective payments "but only with respect to a State whose State plan . . . includes provision for . . .

"opportunity for a fair hearing before the State agency on the determination . . . [of need for protective payment] for any individual with respect to whom it is made."

6200. *Requirements for State Plans*

A State plan for OAA, AFDC, AB, APTD, or AABD must provide that:

(a) The State agency will be responsible for fulfillment of fair hearings provisions, and shall specify the hearing authority.

(b) An opportunity for a fair hearing before the State agency will be granted to any individual requesting a hearing because his claim for assistance is denied, is not acted upon with reasonable promptness, or because he is aggrieved by any other agency action affecting his receipt or termination of assistance, or by agency policy as it affects his situation.

(c) Decisions by the hearing authority, rendered in the name of the State agency, will be binding on the State and local agency. The State agency will establish and maintain a method for informing, at least in summary form, all local agencies of all fair hearing decisions by the hearing authority, and the decisions will be accessible to the claimants, their representatives, and the public (subject to provisions relating to safeguarding public assistance information).

(d) The hearings will be conducted by an impartial official (or officials) of the State agency.

(e) Hearing procedures will be issued and publicized by the State agency for the guidance of all concerned.

(f) Every claimant will be informed in writing at the time of application and at the time of any agency action affecting his claim

(1) of his right to a fair hearing;

(2) of the method by which he may obtain a hearing;

(3) that he may be represented by others including legal counsel; and

(4) of any provision for payment of legal fees by the agency.

(g) The hearing will be conducted at a time, date, and place convenient to the claimant, and adequate preliminary written notice will be given.

(h) When the hearing involves medical issues, a medical assessment other than that of the person or persons involved in making the original decision will be obtained and made a part of the record if the hearing officer or the appellant considers it necessary.

(i) The claimant or his representative will have the opportunity

(1) to examine all documents and records used at the hearing;

(2) at his option, to present his case himself or with the aid of others, including legal counsel;

(3) to bring witnesses;

(4) to establish all pertinent facts and circumstances;

(5) to advance any arguments without undue interference; and

(6) to question or refute any testimony or evidence.

(j) Prompt, definitive, and final administrative action will be taken within 60 days from the date of the request for a fair hearing. The claimant will be notified of the decision, in writing, in the name of the State agency and, to the extent it is available to him, of his right to judicial review.

(k) When the hearing decision is favorable to the claimant, or when the agency decides in favor of the claimant prior to the hearing, the agency will make the corrected payments retroactively to the date the incorrect action was taken.

(l) The hearing officer's (or panel's) recommendations shall be based exclusively on evidence and other material introduced at the hearing. The verbatim transcript of testimony and exhibits, or an official report containing the substance of what transpired at the hearing, together with all papers and requests filed in the proceeding, and the hearing officer's or panel's recommendations, will constitute the exclusive record for decision by the hearing authority and will be available to the claimant at a place accessible to him or his representative at any reasonable time.

6300. *Criteria for the Administration of the Plans*

(a) The State agency establishes policies and procedures that carry out the purpose and provisions of this policy and that assure equity of treatment in relation to the laws and standards pertaining to assistance.

The State agency takes the necessary steps to see that there is uniformity in the application of agency policy in similar situations.

(b) A request for a hearing is considered as any clear expression (oral or written) by the claimant (or person acting for him, such as his legal representative, relative, or friend) to the effect that he wants an opportunity to present his case to higher authority. The freedom to make such a request is not limited or interfered with in any way, and agency emphasis will be on helping the claimant in submitting and processing his request, and in preparing his case, if needed.

(c) Opportunity for a fair hearing includes:

(1) Consideration of any action, or failure to act with reasonable promptness, on a claim for assistance which includes undue delay in reaching a decision on eligibility or in making a payment, refusal to consider a request for or undue delay in making an adjustment in payment, and suspension or discontinuance of assistance in whole or in part;

(2) Consideration of the agency's interpretation of the law, and the reasonableness and equitableness of the policies promulgated under the law, if the claimant is aggrieved by their application to his situation;

(3) Consideration of agency decisions regarding:

(i) Eligibility for assistance in both initial and subsequent determinations,

(ii) Amount of assistance or change in payments,

(iii) The manner or form of payments, including restricted or protective payments, even though no Federal financial participation is claimed, and

(iv) Conditions of payments, including work requirements.

(d) Provision is made for reasonable time in which to appeal agency action.

(e) Final administrative action is taken within the 60-day limit (IV-6200, item j), except that where the claimant requests a delay in the hearing in order to prepare his case or for other essential reasons, reasonable time is given and such extra time may be added to the 60 days.

(f) The agency does not deny or dismiss a request for a hearing except where it has been withdrawn by the claimant in writing or abandoned.

A request for a hearing is considered abandoned only if neither the claimant nor his representative appears at the time and place agreed upon for the hearing, and if within a reasonable time after the mailing of an inquiry as to whether he wishes any further action on his request for a hearing, no reply is received by either the local or State agency.

(g) The hearing authority may be the highest executive officer of the State agency, a panel of agency officials or a hearing officer appointed for that purpose, but no person who participated in the local decision

being appealed will participate in a final administrative decision on such case. The hearing authority is responsible for a final administrative decision in the name of the State agency on all issues that have been the subject of a hearing. The decision of the hearing authority is binding on the State and local agency. The State agency is responsible for seeing that the decision is carried out promptly.

Insofar as may be applicable, a decision in favor of the claimant applies retroactively to the date the incorrect action was taken, and also applies prospectively.

(h) The impartial official (or officials) of the State agency who is responsible for conducting the hearing has not been involved in any way with the action in question.

(i) The issuance of hearing procedures is in the form of rules and regulations, or in some other form in which they will be publicized.

(j) Written notification and, to the extent possible, oral explanation of the right to and procedure for requesting a fair hearing are given at the time of application. Written notice, and oral explanation as necessary, are given at the time of any agency action affecting the claim for assistance, including change in or termination of assistance.

(k) Individuals are informed of their right to be represented at fair hearings by others. At his option, the claimant may be represented by legal counsel or by a relative, friend or other spokesman, or may represent himself.

(l) The convenience of the claimant is considered in setting the date, time, and place for the hearing. Notice is given in writing with adequate preliminary information about the hearing procedure necessary for his preparation for the hearing and effective presentation of his case. He is advised as to the use of witnesses and legal counsel or other representative, as well as any procedure or financial provisions for ob-

taining legal representation, including availability of fees for legal counsel from the agency.

(m) When an assessment by a medical authority, other than the one involved in the decision under question, is requested by the claimant, it is obtained, at agency expense, from a medical source satisfactory to the claimant. The hearing officer can also consider the physician's report in the record or can request additional evidence. The assessment of such medical authorities will be reported in writing or by personal testimony as an expert witness for the hearing record.

(n) The claimant or his representative has adequate opportunity to examine material that will be introduced as evidence prior to the hearing as well as during the hearing, to give all the evidence on points at issue he believes necessary without undue interference, to ask for substantiation of any statements made by others, and to present evidence in rebuttal.

(o) Non-record or confidential information which the claimant does not have an opportunity to hear or see is not made a part of the hearing record or used in a decision on the appeal. The hearing officer does not review the case record, or other material prior to the hearing unless such material is made available to the claimant or his representative.

6400. *Interpretation*

(a) *Opportunity for a Fair Hearing*

Fair hearing procedures, including the conduct of the hearing, are designed to assure the right of every claimant to demand and obtain a fair hearing. The claimant's freedom to request a hearing, whenever he believes that proper consideration has not been given to all the circumstances surrounding his claim, is a fundamental right and is not to be limited or interfered with in any way.

Since, under the Federal act and the State plan, every aggrieved claimant is entitled to the opportunity for a hearing, only the claimant may withdraw his re-

quest for a hearing and this is to be in the form of a written withdrawal.

Effective complaint and adjustment procedures, whereby corrective action may be easily requested and readily taken without the need for a hearing, are necessary, when indicated. Advance opportunity afforded the recipient to respond to questions which could result in change of grant or termination is a significant part of such procedures. So is written, and whenever practical, oral information of the reasons for change, denial, or termination. This is particularly important where the agency decision is based on judgmental factors or eligibility requirements that entail evaluative decisions on the part of workers, as compared to decisions based on non-debatable facts (such as receipt of OASI, death, etc.). However, the State and local agency adjustment procedures cannot be allowed to interfere with the hearing process.

The claimant's right to a hearing includes the privilege of presenting his case in any way he desires. Some will wish to tell their story in their own way, some will desire to have a relative or friend present the evidence for them, and still others will want to be represented by legal counsel. In many instances the recipient's position can best be presented by an attorney. In order for the claimant to obtain an attorney, legal fees may need to be provided by the State. Federal financial participation is available in meeting the cost of these fees. States are urged to provide payment for the services of an attorney, or refer recipients to attorneys otherwise available in the community, because of the skill and knowledge of the legal profession in these matters. Furthermore, the claimant may bring any witnesses he desires to help him establish pertinent facts and to explain his circumstances.

The hearing is conducted in an informal rather than formal court-type procedure in order to serve the best interests of the claimant; however, the hearing is to be subject to the requirements of due process.

(b) *Publication of Hearing Procedures*

The publication of hearing procedures in the form of rules and regulations or a clearly stated pamphlet helps to emphasize the importance of the procedure. This material is useful to applicants and recipients or to others interested in their behalf. It contributes to the fairness of the hearing procedure, and emphasizes that there is "due process" in program administration affecting the right to public assistance.

(c) *Informing the Claimant of His Right to a Hearing*

Written notification of the right to a hearing may be on the application form and other forms routinely used by the agency which go to applicants and recipients, as well as an explanatory pamphlet distributed by the agency. Oral explanations should also be given regarding the policy on hearings at intake and at time of a change in eligibility.

The purpose of informing the claimant of his right to a hearing, in writing, and whenever practicable orally, is to assure that the claimant fully understands this right. This right is further assured by the agency explaining the right to a hearing in understandable terms and in being helpful as needed in the preparation for and conduct of the hearing.

(d) *Convenience of the Claimant Considered*

The agency has not discharged its responsibility for a hearing unless it has taken all steps necessary to enable a claimant who requested a hearing to attend the hearing in person or to be represented by a person of his own choosing. If the hearing is to be held at a considerable distance from the locality of the claimant's residence, it may be necessary to provide for the transportation and other costs of the claimant, his representative, and his witnesses.

Notice to claimant as to the hearing being scheduled in his behalf includes information about the fair hear-

ing as an informal administrative procedure, in which a dissatisfied claimant or his representative may present his grievance with the help of witnesses or legal representation to show why action or inaction in his case should be corrected by the State agency.

(e) *Impartiality of Official Conducting the Hearing*

The person conducting the hearing shall not have been connected in any way with previous actions or decisions on which the appeal is made. For example, a field supervisor who has advised the local agency in the handling of a case would be disqualified from acting as the hearing officer.

(f) *Impartiality of the Hearing Authority*

The hearing authority shall not have been directly connected with the agency action about which the claimant is appealing.

(h) *Opportunity to Examine the Official Record*

The record of the proceedings at the hearing, which constitute the official record, is to be made available to the claimant or his representative to examine, if he desires. If any additional material is made a part of the hearing record, this, too, would be made available.

(i) *Judicial Review*

In some States, the right of judicial review may be prescribed by statute specifically authorizing review of the agency decision on the basis of the record of administrative proceedings. In other States, even in the absence of statutory provisions, a claimant may be able to invoke the remedy of judicial review on the showing that the agency action was "unreasonable, arbitrary, or capricious." The content of the notice of decision, as regards judicial review, would depend upon the kind of remedy available in the State.

6500. *Federal Financial Participation*

Federal financial participation is available in:

(a) Payments made to carry out hearing decisions, or to take corrective action prior to the hearing, including corrected payments retroactively to the date the incorrect administrative action was taken.

(b) Payments of assistance continued pending a hearing decision.

(c) Administrative costs necessary for:

(1) Carrying out the hearing procedures;

(2) Providing transportation and other costs for the claimant, his representative and witnesses to and from the place of the hearing;

(3) Fees for legal counsel; and

(4) Other costs, expenditures, and fees reasonably related to the hearing, including expenses involved in obtaining an additional medical assessment.